

File



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

Application of Juneau County Forestry and Parks
Department for a Permit to Construct a
Snowmobile Bridge Across the Lemonweir River,
Juneau County, Wisconsin

Case No.: 3-WC-97-400336

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PERMIT

Juneau County Forestry and Parks Department, 250 Oak Street, Mauston, Wisconsin 53948, applied to the Department of Natural Resources for a permit to construct an 85-foot long by 12-14 foot wide timber snowmobile bridge over the Lemonweir River. The proposed project would take place approximately 500-600 feet downstream of the Highway HH bridge. The purpose of the project is to provide safe access for snowmobiles across the Lemonweir River. The project site is located in the W ½ of the NE ¼ of Section 22, Township 15 North, Range 5 East, Town of Marion, Juneau County, Wisconsin.

The Department of Natural Resources issued a Notice of Proposed Bridge Project which stated that unless written objection was made within 30 days of publication of the Notice, the Department might issue a decision on the permit without a hearing. The Department of Natural Resources does not oppose this project if certain conditions are met.

On February 3, 1999, the Department filed a Request for Hearing with the Division of Hearings and Appeals.

Pursuant to due notice hearing was held on May 11, 1999 at Mauston, Wisconsin, Jeffrey D. Boldt, administrative law judge (ALJ), presiding. The parties requested an opportunity to submit written arguments, and the last was received on May 27, 1999.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Juneau County, by

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Wisconsin Department of Natural Resources, by

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FINDINGS OF FACT

1. The Juneau County Forestry and Parks Department, 250 Oak Street, Mauston, Wisconsin 53948, completed filing an application with the Department for a permit under sec. 30.12, Stats., to the DNR for a permit to construct a bridge over the Lemonweir River in the Town of Marion, Juneau County. The Department and the applicant have fulfilled all procedural requirements of secs. 30.123 and 30.20, Stats.

2. The applicant has had a right-of-way easement on property located in the W ½ of the NE ¼ in Section 22, Township 15 North, Range 5 East, Town of Marion, Juneau County.

The above-described property abuts the Lemonweir River which is navigable in fact at the project site.

3. The applicant proposes to construct an 85-foot long, 12-14 foot wide timber snowmobile bridge over the Lemonwieir River.

4. The purpose is to provide safe crossing of the Lemonweir River for snowmobiles using the snowmobile trail developed by Juneau County.

5. The proposed bridge will not materially obstruct existing navigation on the Lemonweir River and will not be detrimental to the public interest upon compliance with the conditions of this permit.

6. The project site is located along Old County Trunk Highway HH, partially in the Town of Killdare and the Town of Marion. In 1935, Juneau County (the County) obtained a right-of-way easement by conveyance from J.J. Quinlan to the County. (Ex. 3) In 1975, the County relocated the county trunk highway to a new location. Old HH remained a public road, but was removed from the county trunk system.

7. The objectors own real property recently subdivided and sold for lots by the American Investment Company. The property is proximate to the Old HH. Ms. Wade and Anthony Onofrio own the real property over which the County claims the right-of-way easement. (Ex. 23)

8. Ms. Wade argues that the right-of-way easement was specifically dedicated for the purpose of relocating (the first relocation, in 1934) County HH and that the right-of-way portion reverts back to the landowners when the right-of-way is not used specifically for the purpose of County Highway HH. (Wade brief) However, on its face the deed conveys the right-of-way easement, more generally, for "highway purposes so long as so used." (Ex. 3)

The record at the hearing demonstrated that the roadway has been used continuously by members of the public gaining access to the Lemonweir River. There is no question that Old HH has not been maintained as well as other roads conveying more traffic. The road is crumbling and is seldom plowed in winter. However, persons have regularly used the roadway "for highway purposes" in gaining access to the Lemonweir River since at least 1975. However, it is not clear from the record that a snowmobile trail is a "highway purpose" within the meaning of the conveyance. Section 340.01(74), Stats., generally exempts snowmobiles from the definition of a "vehicle" for highway purposes. Further, the Division and the DNR do not have jurisdiction over real estate disputes which call for an interpretation of deeds to real property. The DNR instead argues for the inclusion of condition 10, which requires the applicant to either prove riparian status or gain the permission of the riparian owners. The ALJ has amended this condition to include the possibility of the County obtaining a Declaratory Judgment or other Order of a circuit court interpreting the real estate deeds and the history of uses of the property.

9. The applicant also claims the actual riparian property through adverse possession, given the long period of open use as a public roadway. While the applicant appears to have a

solid argument in this regard, the Division lacks jurisdiction to order that an adverse possession has occurred. Further, the hearing was not Noticed as being a determination of an equitable claim of title has been accomplished.

10. There are no substantial environmental concerns relating to construction of the proposed bridge at this location over the Lemonweir River. The DNR Area Fish, Water and Wildlife Managers all indicated that they have no objections to the bridge, so long as it is built in accordance with the conditions set forth below. (Ex. 20)

No detrimental impacts to wetlands, wildlife or the warmwater fishery are likely to occur as a result of bridge construction. (Wolter)

The only significant environmental concern raised at the hearing related to the possibility of litter and debris build-up under the bridge and the possibility of graffiti impacting natural scenic beauty. At hearing the County agreed to be responsible for maintenance relating to each of these concerns, and a specific condition reflecting this fact has been added to the permit.

The proposed bridge will not be "detrimental to the public interest" in the Lemonweir River.

11. The applicant is financially capable of constructing, maintaining, monitoring or removing the bridge if it should be found in the public interest to do so.

12. The proposed structure will not reduce the effective flood flow capacity of the Lemonweir River upon compliance with the conditions in the permit.

13. The proposed structure will not adversely affect water quality nor will it increase water pollution in the Lemonweir River. The structure will not cause environmental pollution as defined in sec. 299.01(4), Stats., if the structure is built and maintained in accordance with this permit.

14. The Department of Natural Resources has complied with the procedural requirements of sec. 1.11, Stats., and Chapter NR 150, Wis. Adm. Code, regarding assessment of environmental impact.

DISCUSSION

There are no significant environmental concerns connected with the construction of the proposed snowmobile bridge. There are, however, issues relating to real property that justify the inclusion of Condition 10, requiring resolution of these disputes, prior to construction of the bridge. Administrative agencies have only such powers as are expressly granted to them or necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds. American Brass Co. v. State Board of Health, 245 Wis. 440 (1944). The DNR and the Division do not have expertise or authority to interpret real estate conveyances when there are disputed issues relating to interpretation of such a

conveyance. Nor can an administrative agency, which lacks equitable powers, enter an order rendering an equitable remedy in such a dispute.

CONCLUSIONS OF LAW

1. The applicant is not a riparian owner within the meaning of sec. 30.123, Stats.
2. The proposed structure described in the Findings of Fact constitute a bridge within the meaning of sec. 30.123, Stats.
3. The Division of Hearings and Appeals has authority under secs. 30.123 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue a permit for the construction and maintenance of said bridge subject to the conditions specified.
4. The project is a type III action under sec. NR 150.03(8)(f)4, Wis. Adm. Code. Type III actions do not require the preparation of a formal environmental impact assessment.

PERMIT

1. The permittee is responsible for obtaining any permit or approval required by municipal, town or county zoning ordinances or by the U.S. Army Corps of Engineers before starting the project.
2. The permittee shall allow free and unlimited access to the project site at any time to any Department employee who is investigating the project's construction, operation or maintenance.
3. The Department may change or revoke this permit if the project obstructs navigation or becomes detrimental to the public interest.
4. This permit has been issued with the understanding that any construction equipment used is the right size to do the job, and can be brought to and removed from the project's site without unreasonable harm to vegetative cover or fish or wildlife habitat. This permit may be rescinded or revoked if the Department determines that the conditions of this permit have not been followed or if it finds the activity to be detrimental to the public interest.
5. You must prevent erosion and siltation in the stream during construction. Any grading or topsoil removal on the banks of the stream must occur over as small an area as possible and must be kept under 10,000 square feet.

6. The permittee shall assume all responsibility and liability for any direct or indirect damage caused or resulting from the presence of the bridge and hold the State of Wisconsin, or its employees, harmless.

7. The Department has not done an analysis of the bridge's ability to support loads to be imposed upon it.

8. You are responsible and liable for any direct or indirect damages which may result from the bridge.

9. This approval does not authorize you to place any fill in wetlands or on the streambed, nor any other alteration of the waterway which might require a Department of Natural Resources permit.

10. Prior to beginning construction, the applicant must furnish to the Department proof that it has obtained the status of riparian owner or has secured an Order of a circuit court competent to rule on real estate disputes or has obtained the permission of the riparian owners of the land on which the bridge will be located.

11. You must provide proper navigational clearance underneath the bridge. The bottom of the bridge must be constructed at an elevation of 855.0 msl.

12. The County shall be responsible for all routine maintenance of the bridge, and shall keep the river free of debris and the bridge structure free of graffiti to protect the public interest.

13. A copy of this permit shall be kept at the project site at all times until the project has been completed.

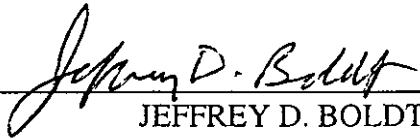
14. Acceptance of this permit and beginning the project means that you have read, understand and agree to follow all conditions of this permit.

15. This permit expires three years from the date of this decision if the project is not completed before then. No construction may begin or continue after this date unless a new permit or permit extension is granted in writing by the Department.

16. The permittee shall notify the Water Management Specialist at (715) 421-7815 or 473 Griffith Avenue, Wisconsin Rapids, WI 54494, not less than 5 days before starting construction and again not more than 5 days after the project is complete.

Dated at Madison, Wisconsin on June 30, 1999

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: 
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.